Kawasaki Kisen Kaisha Ltd v Owners of the Ship or Vessel 'Able Lieutenant'

HIGH COURT (SHAH ALAM) — ADMIRALTY IN REM NO MT4–27–26 OF 2002

ZULKEFLI J

26 AUGUST 2002

Civil Procedure *— Writ of summons — Setting aside — Striking out — Application to set aside writ or to strike out writ for abuse of the court process and/or frivolous and vexatious — Failure to make an election as to whether to challenge the court's jurisdiction or to invoke the court's jurisdiction to hear the case on its merits — Whether failure to make election fatal*

Shipping and Navigation *— Action in rem — Arrest of vessel — Application by third party to set aside writ on the grounds of beneficial ownership — Whether third party lacked the capacity to apply to court to set aside the writ — Whether the right to set aside was restricted to the real defendant only*

Shipping and Navigation *— Action in rem — Arrest of vessel — Defendant registered as owner vessel in the ship register — Allegation that vessel had been sold to third party and that third party was the beneficial owner — Extent that plaintiff must prove beneficial ownership of vessel — Whether burden was on plaintiff to prove beneficial ownership of a registered vessel only in the case where the defendant was not the registered owner at the time when the action was brought and the vessel arrested — Supreme Court Act 1981 [UK] s 21(4)*

Shipping and Navigation *— Shipping law — Purchase of vessel — Vessel not registered in purchaser's name despite alleged purchase — Vendor continued to be registered as owner of vessel in the ship register — Whether ship register was conclusive except for error or fraud — Whether purchase was a sham*

The plaintiff, as charterer of the defendant's ship 'Able Lieutenant' ('the said vessel') under a charterparty, claimed damages for losses and damages suffered by it due to the defendant's breach of the charterparty. The defendant ('Able Shipping') had executed the charterparty in its capacity as owner of the said vessel. The defendant was also registered at the port of registry, Port Klang as the owner of the said vessel. The plaintiff issued the writ of summons on 24 November 2001 and on 29 November 2001, the plaintiff obtained a warrant of arrest for the said vessel. The warrant was executed and the said vessel was arrested in Port Klang. On 4 December 2001, Pan Ocean Shipping Sdn Bhd ('Pan Ocean'), claiming to be the beneficial owner of the said vessel, entered a conditional appearance as defendant as of right. On 6 December 2001, Able Shipping entered a conditional appearance as defendant also as of right. This judgment concerned the applications by the plaintiff, the defendant and Pan Ocean. In encl 29, Pan Ocean applied to: (a) set aside the writ of summons; (b) strike out the writ of summons; (c) set aside the warrant of arrest and release the said vessel from arrest. Pan Ocean further applied (in the event that encl 29 was dismissed by the court), for leave

to file a bail bond in the form of Appendix 1 annexed to the application without submitting to the jurisdiction of this court and for the release of the said vessel upon filing of the bail bond ('encl 21'). The defendant applied, in encl 31, to: (a) set aside the writ of summons; (b) strike out the indorsement of claim in the writ of summons under O 18 r 19(1)(b) or (c) or (d) of the Rules of the High Court 1980 ('the RHC'); (c) set aside the warrant of arrest and release the said vessel. The plaintiff applied for the orders that Pan Ocean's leave to enter conditional appearance and its memorandum of conditional appearance be set aside and that Pan Ocean cease to be a party in these proceeding ('encl 39'). There was apparently an agreement made between Pan Ocean and Able Shipping pertaining to the sale of the said vessel. The relevant documents for transfer had allegedly been sent to the ship registry in Port Klang but the transfer was still unattended to. In reply, the plaintiff contended that the transfer of beneficial ownership was a sham because the said vessel had an outstanding mortgage of USD10m, and despite the purported sale of the said vessel to Pan Ocean, the defendant continued to be liable for USD9.5m of the outstanding mortgage.

Held, dismissing encls 21, 29, 31 and allowing encl 39:

(1) As Pan Ocean was not the defendant to the action, it lacked the capacity to apply to the court to set aside the writ. This right was restricted to Able Shipping as it was the real defendant. Consequently, Pan Ocean's application in encl 29 should accordingly be dismissed and the plaintiff's application in encl 39 be allowed (see pp 443D, 445C–D); *The 'Bolbina'* [1994] 1 SLR 554 and *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 followed.

(2) Furthermore, it was wrong for Pan Ocean's counsel to say, in relation to encl 29, that it was for the court to decide whether to set aside the writ of summons ('prayer 1') or to strike out the same for abuse of the court process and/or frivolous and vexatious ('prayer 2'). This was because prayer 1 was a challenge to jurisdiction under O 12 r 7 of the RHC whereas prayer 2 invoked the court's jurisdiction to strike out the writ under the court's summary powers in O 18 r 19 of the RHC. Similar defects were found in the defendant's application (encl 31) as well. Pan Ocean and the defendant had failed, in their respective applications, to make an election as to whether to challenge the court's jurisdiction or to invoke the court's jurisdiction to hear the case on its merits (see pp 457H–458A).

(3) Section 21(4) of the Supreme Court Act 1981 [UK] (given force of law in Malaysia under the Courts of Judicature Act 1964) stipulated, inter alia, that where a claim arose in connection with a ship and the person who would be liable on the claim in action in personam ('the relevant person') was, when the cause of action

arose, the owner of the ship, an action in rem may be brought in the High Court against that ship, if at the time when the action was brought, the relevant person was the beneficial owner of that ship. In respect of the use of the words 'beneficial owner', the law placed the burden on the plaintiff to prove beneficial ownership of a registered ship only in those cases where the defendant was not the registered owner at the time when the action was brought and the vessel arrested. In the instant case, the defendant was the registered owner of the said vessel and the ship register was conclusive except for error or fraud. The onus was therefore on Pan Ocean and the defendant to show that the latter's name had appeared in the register by error or fraud. Since they had not done this, it must be taken that the register was conclusive (see pp 450A–B, 452D–E); *The 'Tian Sheng (No 8)'* [2000] 2 Lloyd's Rep 430 and *The 'Kapitan Tempkin'* [1998] 3 SLR 254 followed; *'The Opal 3'* [1992] 2 SLR 585, *The 'Temasek Eagle'* [1999] 4 SLR 250, *The 'Andres Bonifacio'* [1993] 3 SLR 521 and *The 'Permina 108'* [1977] 1 MLJ 49 distinguished.

(4) The plaintiff had always maintained that the purported transfer of beneficial ownership was a sham and nowhere in plaintiff's affidavits or submission of counsel had the plaintiff alleged fraud. Contrary to the contention by both, the defendant and Pan Ocean, 'sham' did not mean 'fraud' and hence, the plaintiff had to only prove sham on a balance of probabilities and not beyond reasonable doubt. Sham transactions in the context of the present case meant that the sale was not genuine, for example, a sale of convenience. In the instant case, the defendant's sale of the said vessel for USD3m smacked of a sham because the defendant continued to retain the mortgage debt of USD9.5m on the said vessel. Despite Pan Ocean's argument that it had bought the said vessel subject to mortgagee's interests, there was no transfer of mortgage registered at the Port Klang ship registry and under the Merchant Shipping Ordinance 1952 ('MSO'), a bill of sale must be recorded in the ship registry to pass title. As such, the title to the ship cannot pass to the purchaser unless the bill of sale was recorded in the registry in the buyer's name. In any event, based on the circumstances of the present case, whether the property in the said vessel had passed to Pan Ocean or otherwise was a triable issue to be determined at the trial proper (see pp 454A–F, 455B, G); *'Naamlooze Vennootschap'* (1925) 20 Lloyd's LR 296 followed.

(5) As for Pan Ocean's application in encl 21 to furnish an amended bail bond for the release of the said vessel, after the hearing was well under way, Pan Ocean had put forward a fresh amended bail bond by way of an affidavit in encl 50 and had completely abandoned the bail bond of Appendix 1. However, Pan Ocean had not sought an amendment to encl 21 to include this. Hence, the court was not empowered to determine the fresh amended bail

bond in encl 50 because it did not form a part of encl 21. Even assuming that it was proper and in order for Pan Ocean to put forward a fresh amended bail bond by way of an affidavit in encl 50, encl 21 should still be dismissed because: (a) the bail bond did not secure the claim in the action; and (b) the bail bond was prejudicial to the plaintiff as it acknowledged Pan Ocean as the beneficial owner of the said vessel, and that Pan Ocean had the locus standi to apply to set aside or strike out the writ, all of which were challenged by the plaintiff (see pp 458F–G, 459A–D).

[Bahasa Malaysia summary

Plaintif, sebagai penyewa kapal defendan 'Able Lieutenant' ('kapal tersebut') di bawah satu perjanjian menyewa kapal, menuntut ganti rugi untuk kerosakan dan kerugian yang ditanggungnya akibat kemungkiran perjanjian menyewa kapal oleh defendan. Defendan ('Able Shipping') telah melaksanakan perjanjian menyewa kapal dalam keupayaannya sebagai pemilik kapal tersebut. Defendan juga didaftarkan di pejabat daftar pelabuhan, Pelabuhan Klang sebagai pemilik kapal tersebut. Plaintif telah mengeluarkan writ saman pada 24 November 2001 dan pada 29 November 2001, plaintif telah memperolehi satu waran penahanan untuk kapal tersebut. Waran tersebut telah dilaksanakan dan kapal tersebut ditahan di Pelabuhan Klang. Pada 4 Disember 2001, Pan Ocean Shipping Sdn Bhd ('Pan Ocean'), yang mengaku dirinya sebagai pemilik benefisial kapal tersebut, telah memasuki satu kehadiran bersyarat sebagai defendan yang berhak. Pada 6 Disember 2001, Able Shipping memasukkan satu kehadiran bersyarat juga sebagai defendan yang berhak. Penghakiman ini berkaitan permohonan-permohonan oleh plaintif, defendan dan Pan Ocean. Dalam lampiran 29, Pan Ocean memohon untuk: (a) mengetepikan writ saman; (b) membatalkan writ saman; (c) mengetepikan waran penahanan dan membebaskan kapal tersebut daripada tahanan. Pan Ocean seterusnya memohon (andainya lampiran 29 ditolak oleh mahkamah) kebenaran untuk memfailkan bon ikat jamin dalam bentuk Apendiks 1 yang dilampirkan bersama permohonan tanpa menyerah kepada bidang kuasa mahkamah ini dan untuk pelepasan kapal tersebut setelah memfailkan bon ikat jamin ('lampiran 21'). Dalam lampiran 31 defendan memohon untuk: (a) mengetepikan writ saman; (b) membatalkan pengindorsan tuntutan dalam writ saman di bawah A 18 k 19(1)(b) atau (c) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); (c) mengetepikan waran penahanan dan melepaskan kapal tersebut. Plaintif memohon perintah supaya permohonan Pan Ocean untuk memasukkan kehadiran bersyarat dan memorandum kehadiran bersyaratnya diketepikan dan agar Pan Ocean berhenti menjadi satu pihak dalam prosiding ini ('lampiran 39'). Adalah didapati bahawa satu perjanjian telah dibuat di antara Pan Ocean dan Able Shipping berhubung dengan jualan kapal tersebut. Dokumen-dokumen relevan untuk pindahmilik dikatakan telah dihantar kepada pejabat daftar kapal di

Pelabuhan Klang tetapi pindahmilik tersebut masih belum diberi perhatian. Sebagai membalas hujah penjualan kapal tersebut, plaintif telah berhujah bahawa pindahmilik pemilikan benefisial tersebut adalah satu penipuan kerana kapal tersebut mempunyai satu gadaian yang belum dijelaskan sebanyak USD10j, dan meskipun kapal tersebut dikatakan telah dijual kepada Pan Ocean, defendan masih bertanggungjawab ke atas jumlah USD9.5j daripada gadaian yang belum dijelaskan tersebut.

Diputuskan, menolak lampiran-lampiran 21, 29, 31 dan membenarkan lampiran 39:

(1) Oleh kerana Pan Ocean bukan defendan kepada tindakan, ia tidak mempunyai keupayaan untuk memohon kepada mahkamah supaya mengetepikan writ tersebut. Hak ini terbatas kepada Able Shipping kerana ia merupakan defendan sebenar. Seterusnya, permohonan Pan Ocean dalam lampiran 29 sewajarnya ditolak dan permohonan plaintif dalam lampiran 39 dibenarkan (lihat ms 443D, 445C–D); *The 'Bolbina'* [1994] 1 SLR 554 dan *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 diikut.

(2) Tambahan pula, adalah salah untuk peguam bagi pihak Pan Ocean untuk mengatakan, berhubung dengan lampiran 29, bahawa adalah terpulang kepada mahkamah untuk memutuskan sama ada untuk mengetepikan writ saman tersebut ('permohonan 1') atau membatalkan writ saman tersebut atas penyalahgunaan proses mahkamah dan/atau perkara yang remeh dan menyusahkan ('permohonan 2'). Ini adalah kerana permohonan 1 merupakan satu cabaran kepada bidang kuasa di bawah A 12 k 7 KMT manakala permohonan 2 menggunakan bidang kuasa mahkamah untuk membatalkan writ di bawah kuasa terus mahkamah dalam A 18 k 19 KMT. Ketidaksempurnaan yang serupa juga dijumpai dalam permohonan defendan (lampiran 31). Dalam permohonan masing-masing, Pan Ocean dan defendan telah gagal membuat pilihan mengenai sama ada untuk mencabar bidang kuasa mahkamah atau menggunakan bidang kuasa mahkamah untuk mendengar kes di atas meritnya (lihat ms 457H–458A).

(3) Seksyen 21(4) Akta Mahkamah Agung 1981 [UK] (yang berkuatkuasa di Malaysia di bawah Akta Mahkamah Kehakiman 1964) menetapkan, antara lain, bahawa di mana satu tuntutan timbul berhubung dengan sebuah kapal dan pihak yang akan bertanggungjawab atas tuntutan dalam tindakan in personam ('pihak relevan') adalah, apabila kausa tindakan timbul, pemilik kapal tersebut, satu tindakan in rem boleh dimulakan di Mahkamah Tinggi terhadap kapal itu, sekiranya pada masa tindakan dimulakan, pihak relevan merupakan pemilik benefisial kapal tersebut. Berhubung penggunaan perkataan-perkataan

'beneficial owner', undang-undang meletakkan beban ke atas plaintif untuk membuktikan pemilikan benefisial sesebuah kapal berdaftar hanya di dalam kes-kes di mana defendan bukan pemilik berdaftar pada masa tindakan dimulakan dan kapal ditahan. Dalam kes ini, defendan merupakan pemilik berdaftar kapal tersebut dan daftar kapal adalah muktamad kecuali berlakunya kesilapan atau fraud. Maka beban terletak ke atas Pan Ocean dan defendan untuk menunjukkan bahawa nama defendan telah muncul dalam daftar tersebut kerana kesilapan atau fraud. Memandangkan bahawa mereka tidak berbuat demikian, ia mesti dianggap bahawa daftar tersebut adalah muktamad (lihat ms 450A–B, 452D–E); *The 'Tian Sheng (No 8)'* [2000] 2 Lloyd's Rep 430 dan *The 'Kapitan Tempkin'* [1998] 3 SLR 254 diikut; *'The Opal 3'* [1992] 2 SLR 585, *The 'Temasek Eagle'* [1999] 4 SLR 250, *The 'Andres Bonifacio'* [1993] 3 SLR 521 dan *The 'Permina 108'* [1977] 1 MLJ 49 dibeza.

(4) Selama ini, plaintif telah menegaskan bahawa pindahmilik pemilikan benefisial yang dikatakan tersebut merupakan satu penipuan dan tidak terdapat di mana-mana pun sama ada di dalam afidavit plaintif ataupun hujah peguamnya bahawa plaintif telah mengatakan ia adalah fraud. Bertentangan dengan hujah defendan dan Pan Ocean, 'sham' tidak bermaksud 'fraud' dan justeru itu, plaintif hanya perlu membuktikan penipuan tersebut atas imbangan kebarangkalian dan bukan melampaui keraguan munasabah. Transaksi penipuan dalam konteks kes ini bermaksud bahawa jualan itu tidak sempurna, misalnya satu jualan demi kemudahan. Dalam kes ini, jualan kapal tersebut oleh defendan untuk USD3j berunsur penipuan kerana defendan masih mengekalkan hutang gadaian sebanyak USD9.5j atas kapal tersebut. Meskipun Pan Ocean berhujah bahawa ia telah membeli kapal tersebut tertakluk kepada kepentingan pihak yang meminjam wang di dalam gadaian, tiada pindahmillik dilakukan atas gadaian yang didaftarkan di pejabat daftar Pelabuhan Klang dan di bawah Ordinan Perkapalan Saudagar 1952; satu bil jualan mesti direkodkan dalam daftar kapal agar hakmilik boleh beralih. Oleh yang demikian, hak milik kepada kapal tersebut tidak boleh beralih kepada pembeli melainkan bil jualan direkodkan dalam daftar atas nama pembeli. Walau bagaimanapun, berdasarkan keadaan-keadaan kes ini, sama ada harta dalam kapal tersebut telah beralih kepada Pan Ocean atau sebaliknya adalah satu isu yang perlu dibicarakan dan yang harus diputuskan di perbicaraan sewajarnya (lihat ms 454A–F, 455B, G); *'Naamlooze Vennootschap'* (1925) 20 Lloyd's LR 296 diikut.

(5) Berhubung permohonan Pan Ocean dalam lampiran 21 untuk menyediakan satu bon ikat jamin terpinda bagi pelepasan kapal tersebut, selepas pembicaraan telah pun berlangsung, Pan Ocean mengemukakan satu bon ikat jamin terpinda yang baru menerusi satu afidavit dalam lampiran 50 dan telah meninggalkan

keseluruhan bon ikat jamin dalam Apendiks 1. Walau bagaimanapun, Pan Ocean tidak memohon pindaan kepada lampiran 21 untuk memasukkan perkara ini. Justeru itu, mahkamah tidak diberikuasa memutuskan bon ikat jamin terpinda yang baru dalam lampiran 50 kerana ia tidak membentuk sebahagian daripada lampiran 21. Jikapun dengan menganggap ianya wajar dan untuk membolehkan Pan Ocean mengemukakan satu bon ikat jamin terpinda yang baru menerusi satu afidavit dalam lampiran 50, lampiran 21 sepatutnya ditolak kerana: (a) bon ikat jamin tersebut tidak menjamin tuntutan dalam tindakan; dan (b) bon ikat jamin tersebut memudaratkan plaintif kerana ia mengakui Pan Ocean sebagai pemilik benefisial kapal tersebut, dan Pan Ocean mempunyai locus standi untuk memohon agar writ diketepikan atau dibatalkan, yang kesemuanya dicabar oleh plaintif (lihat ms 458F–G, 459A–D).]

Notes

For cases on arrest of vessel, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 806–952.

For cases on purchase of vessel, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1362–1363.

For cases on setting aside a writ of summons, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6631–6643.

Cases referred to

'APJ Shalin' [1991] 2 Lloyd's Rep 62 (refd)
'Andres Bonifacio, The' [1993] 3 SLR 521 (distd)
'Aventicum', The [1978] 1 Lloyd's Rep 184
'Banco, The' [1971] 1 Lloyd's Rep 49 (refd)
'Bineta, The' [1966] 2 Lloyd's Rep 419 (refd)
'Bolbina, The' [1994] 1 SLR 554 (folld)
'Bulgaria, The' [1964] 2 Lloyd's Rep 524 (refd)
'Eschersheim, The' [1976] 2 Lloyd's Rep 1 (refd)
'Evpo Agnic, The' [1988] 2 Lloyd's Rep 411 (refd)
'Hope (ex-Panagia)', The (1998) 1 LNS 177 (refd)
'I Congresso Del Partido', The [1977] 1 Lloyd's Rep 536 (refd)
'Kapitan Temkin, The '[1998] 3 SLR 254 (folld)
'Kommunar, The' (No 2) [1997] 1 Lloyd's Rep 8 (refd)
'Loon Chong, The' [1982] 1 MLJ 212 (refd)
'Mawan', The [1998] 2 Lloyd's Rep 459 (refd)
'Naamlooze Vennootschap' (1925) 20 Lloyd's LR 296 (folld)
'Ohm Mariana, The' [1993] 2 SLR 698 (refd)
'Opal 3, The' [1992] 2 SLR 585 (distd)
PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd [1999] 6 MLJ 1 (refd)
Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453 (folld)
'Premina 108' [1977] 1 MLJ 49 (distd)

'Saudi Prince', The [1982] 2 Lloyd's Rep 255
'Sino Glory, The' [1997] 4 AMR 3694 (refd)
'Temasek Eagle', The [1999] 4 SLR 250 (distd)
'Tian Sheng (No 8)', The [2000] 2 Lloyd's Rep 430 (folld)
'Tjaskemolen', The [1997] 2 Lloyd's Rep 465 (refd)
'Wilbie', The [1983] 1 MLJ 204 (refd)
'Yih Shen', The [1985] 2 MLJ 154 (refd)

Legislation referred to

Administration of Justice Act 1956 [UK]
Arrest Convention 1952 arts 3.1, 3.2
Courts of Judicature Act 1964 s 24(b)
Courts of Judicature (Amendment) Act 1964
Courts of Judicature (Amendment) Act (No 2) 1984
Courts of Judicature (Amendment) Act 1987
Merchant Shipping Ordinance 1952
Rules of the High Court 1980 O 12 r 7, O 18 r 19, (1)(b), (c), (d), O 70 rr 15, 16, Form 155
Supreme Court Act 1981 [UK] ss 20, (1), (2), 21, (4), (b) (i), 22, 23, 24

Mathew Kurien (*Raj Sativale* with him) (*Sativale Mathew Arun*) for the plaintiff.

Eric Siow (*Lee Ong Kandiah*) for the defendant Able Shipping.

S Selvaratnam (*Kevin Wong* with him) (*Tommy Thomas*) and *TS Oon* (*TS Oon & Partners*) for the defendant Pan Ocean.

Zulkefli J:

Facts of the plaintiff's case

The plaintiff's claim, as indorsed on the writ of summons, is as follows:

The plaintiff, as charterer of the defendant's ship or vessel 'Able Lieutenant' under a charterparty dated 2 October 2000 claimed damages for the losses and damages suffered by it by reason of the defendant's breach of the said charterparty together with interest and costs. The defendant in this action is Able Shipping Sdn Bhd ('Able Shipping') who executed the said charterparty in its capacity as owner of the vessel 'Able Lieutenant' and is also the registered owner of the vessel 'Able Lieutenant' which is registered at the port of registry, Port Klang. The plaintiff issued the writ of summons on 24 November 2001. On 29 November 2001, the plaintiff obtained a warrant of arrest for the vessel 'Able Lieutenant', and on the same day, the warrant was executed and the ship arrested in Port Klang. On 4 December 2001, Pan Ocean Shipping Sdn Bhd ('Pan Ocean'), claiming to be the beneficial owner of the ship 'Able Lieutenant', entered a conditional appearance as defendant as of right. On 6 December 2001, Able Shipping, the proper defendant and registered owner of the ship 'Able Lieutenant' entered a conditional appearance as defendant also as of right.

Purpose of arrest of ship in an admiralty action in rem

At the outset, it is also important to note that the purpose of arresting a ship in an action in rem is to obtain security for the satisfaction of any judgment which the plaintiff may obtain in such an action, or of any sum which may become payable to him under a settlement of such an agreement. In practice, this threat of an arrest provokes the owners into providing voluntary security, for example by way of either a bank or insurance company guarantee, or letter of undertaking or filing a bail bond. The court does not have any jurisdiction to arrest or keep the ship under arrest for other purposes. Such security will ensure that the plaintiff's prospects of recovery are not hampered by any transfer of ownership in the ship or any financial impecuniosity of the shipowner. If security is not furnished by the shipowner, the arrest of the ship will be maintained until such step is taken by the plaintiff under the in rem process to seek from the court a judicial sale order of the ship.

Pan Ocean's notice of motion in encl 29

In the motion taken out on 14 December 2001, Pan Ocean, which has entered conditional appearance as the beneficial owner of the vessel 'Able Lieutenant' in the above suit, seeks the following orders:

1 to set aside the writ of summons dated 24 November 2001;

2 to strike out the writ for abuse of the court process and/or frivolous and vexatious;

3 to set aside the warrant of arrest issued for the vessel 'Able Lieutenant';

4 to forthwith release the vessel 'Able Lieutenant' from arrest;

5 as an alternative to (4), to discharge any security furnished for the release of the vessel 'Able Lieutenant' and for the return of the security to Pan Ocean;

6 to assess the damages for wrongful arrest suffered by Pan Ocean;

7 costs and costs of the motion to be borne by the plaintiff; and

8 such other relief that this honourable court thinks fit and just.

Defendant's summons in chambers in encl 31

In the summons in chambers taken out on 19 December 2001, the defendant, Able Shipping who had entered conditional appearance in the above suit seeks the following orders:

1 the writ of summons dated 24 November 2001 and its service and all further proceedings in this action;

2 alternatively, to strike out the indorsement of claim in the writ of summons dated 24 November 2001 under O 18 r 19(1)(b) of the Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the court for the reason that it is scandalous, frivolous

or vexatious and detrimental to the beneficial owners of the ship or vessel 'Able Lieutenant';

3 alternatively, to strike out the indorsement of claim on the writ of summons dated 24 November 2001 under O 18 r 19(1)(c) of the RHC and under the inherent jurisdiction of the court for the reason that it may prejudice, embarrass or delay the fair trial of the action;

4 alternatively, the indorsement of claim on the writ of summons dated 24 November 2001 be struck out under O 18 r 19(1)(d) of the RHC and under the inherent jurisdiction of the court for the reason that it is an abuse of the court process;

5 to set aside the warrant of arrest dated 29 November 2001 on the ship or vessel 'Able Lieutenant';

6 that the ship or vessel 'Able Lieutenant' presently under arrest in Port Klang be released from arrest forthwith;

7 that costs be assessed and paid out by the plaintiff to Able Shipping Sdn Bhd forthwith; and

8 that Able Shipping Sdn Bhd be given all further relief or other relief as the honourable court thinks fit and just.

Plaintiff's summons in chambers in encl 39

The plaintiff took out a summons in chambers on 4 January 2002 in encl 39 for several prayers. On 8 January 2002, this court directed that the following prayers from this application in encl 39 shall be heard simultaneously with Pan Ocean's application in encl 29. The prayers are as follows:

1 an order that leave to enter conditional appearance and the Pan Ocean's memorandum of conditional appearance dated 4 December 2001 be set aside; and

2 an order that Pan Ocean cease to be a party or be considered as a party in this proceedings by reason that the appearance entered by Pan Ocean in these proceedings is wrong in law or does not comply with the RHC and/or the appearance entered by Pan Ocean is irregular without a court order of the honourable court.

Pan Ocean's summons in chambers in encl (21)

On 10 December 2001 Pan Ocean also took out an application seeking the following orders:

1 that leave be given to Pan Ocean to file a bail bond in the form of Appendix I, annexed to the application without submitting to the jurisdiction of the honourable court;

2 that the vessel 'Able Lieutenant' be released from arrest, upon filing of the bail bond in the form of Appendix I without any undertaking by Pan Ocean Sdn Bhd as to costs, charges or expenses relating to the arrest;

3 that service of the notice of bail be dispensed;

4 such further or other order that the honourable court deems fit; and

A 5 that the cost of this application be costs in the cause.

The learned counsel for Pan Ocean at the outset of the hearing informed this court that Pan Ocean would be seeking for the orders as prayed for in encl 21 only in the event that the court dismisses Pan Ocean's application for the orders sought for under its notice of motion as in encl 29.

B

Findings and decision of the court

Having studied the affidavits filed on behalf of the plaintiff, the defendant (Able Shipping) and Pan Ocean, and having heard the submissions of learned counsel for the plaintiff, Able Shipping and Pan Ocean respectively,
C I have arrived at a decision for the applications in encl 21, encl 29, encl 31 and encl 39 for prayers (1) and (2) as follows.

The plaintiff has raised a preliminary objection on Pan Ocean's notice of motion as in encl 29. As regards the plaintiff's preliminary objection to Pan Ocean's notice of motion in encl 29, I hereby allowed the said
D preliminary objection. It is my finding that as Pan Ocean is not the defendant to the action, it lacks the capacity to apply to the court to set aside the writ. This right is restricted to the defendant only. The real defendant, Able Shipping, has entered appearance as well as of right as the defendant in this action and this has caused embarrassment and vexed the proceedings. The claim disclosed on the writ is not against Pan Ocean.
E What Pan Ocean claims is simply a beneficial interest in the ship. Therefore it is merely a person interested in the ship and not a defendant on the claim. On this issue, in *The Bolbina* [1994] 1 SLR 554, the court therein, inter alia, had this to say at p 556:

> Persons against whom no claim is made ought not to be described ... as or
F included as defendants. A defendant enters an appearance as of right whereas persons interested in the ship must obtain leave to intervene and after obtaining leave appear as intervenors.

The above passage was approved by our Court of Appeal in the case of *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997]
G 1 MLJ 453 wherein the Court of Appeal, inter alia, stated as follows at p 469:

> The ship's owners (those legally liable for the plaintiffs' claim) would enter appearance as of right. Persons interested must obtain leave to intervene and after obtaining leave appear as intervenors ... .

H It must also be noted that O 70 r 16 of the RHC provides a specific rule for persons interested in the ship to intervene in an admiralty action and not to come in as a defendant as of right. Pan Ocean appears to have deliberately ignored this provision to take an advantage because, as intervenor, they may not be entitled to seek an order from this court to set aside the writ. In *The 'Mawan' (now named 'Mara')* [1998] 2 Lloyd's Rep 459, the court decided
I that the correct procedure for owners of an arrested vessel who became owners and acquired title after the issue of the writ should be to intervene in the action. Pan Ocean claiming beneficial ownership should therefore

have intervened pursuant to O 70 r 16 of the RHC but did not do so. As such, they cannot be considered a party in this action. Further convincing support comes from *The 'Yih Shen'* [1985] 2 MLJ 154, where a party alleging beneficial ownership had intervened in the action so as to be a proper litigant in the action.

Pan Ocean also argues that the writ does not identify the defendant and that any one claiming to be not a defendant can enter appearance as of right. I could not agree with Pan Ocean's contention. I am of the view that in an admiralty action in rem, it is the practice not to identify a defendant by name on the face of the writ, but to identify the defendant simply as owners of the ship or vessel against whom the claim is made. The writ in this action follows this practice (see Form 155 of the RHC). The identity of the defendant in this case nevertheless has been clearly disclosed by reference to the indorsement on the writ which identifies the charterparty with the defendant, Able Shipping. It is also not disputed that Able Shipping is the registered owner of the ship 'Able Lieutenant' and that they would be liable on the plaintiff's claim.

The test to determine whether a person can be a proper defendant is to consider if that person would be liable for the plaintiff's claim should the plaintiff succeed in the action. Not anyone can jump in as a defendant. On this ground alone, Pan Ocean has no basis to be the defendant. Learned counsel for Pan Ocean argued that owners includes beneficial owners. To my mind, this is plainly wrong because Pan Ocean is not liable on the claim. Pan Ocean has relied on a few case authorities where alleged beneficial owners have appeared as of right. However, in all the cited cases by Pan Ocean, I find there is only one defendant. That alone distinguished those cases from the present situation. In *The 'Temasek Eagle'* [1999] 4 SLR 250 and in *The 'Andres Bonifacio'* [1993] 3 SLR 521, cited by counsel for Pan Ocean, appearance was entered for the owners of the vessel such that if they failed to set aside the writ, the defendants would be liable for the claim. It is also noted that in *The 'Andres Bonifacio'*, the beneficial owners furnished bail bonds for the plaintiffs' claims, so that if they did not succeed to set aside the writ, these bail bonds could be used to satisfy a judgment of the court. In the present case, appearance has been in a special way, with no precedent in the history of admiralty actions — Able Shipping 'as registered owners' and Pan Ocean 'as beneficial owners'. It is also noted that Pan Ocean has refused to furnish bail bond which will not answer to plaintiff's claim. In *The 'Tian Sheng (No 8)'* [2000] 2 Lloyd's Rep 430, the defendant who entered appearance was the registered owner of the vessel, not the beneficial owner as alleged by Pan Ocean. The case has therefore been wrongly cited.

I am of the view that if Pan Ocean is right in its contention, then in each admiralty case, there will always be several defendants — legal owner, beneficial owner, part owner, etc. Obviously this cannot be right because Pan Ocean cannot and has not produced a single authority where there are two defendants or a case where one defendant appears as 'registered owner' and the other as 'beneficial owner' in the same action. On the other hand, I find that learned counsel for the plaintiff has cited a clear authority in the

A Malaysian case of *The 'Ting Yin Shen'* where both the registered owner and the alleged beneficial owner appeared in a different capacity. The owners liable on the claim were the defendants and the party claiming beneficial ownership appeared as interveners. Faced with this unarguable position, learned counsel for Pan Ocean says that the objection is technical. She argued, if Pan Ocean had intervened, this court would have made it a B defendant. I do not see the logic of this argument as an intervener and a defendant are two different persons. A defendant would be liable on the claim but an intervener is not. It is my view that Pan Ocean's appearance as a defendant, when the real defendant has appeared, is not a mere irregularity but a nullity because it affects the substantive rights of the C plaintiff and is prejudicial to the plaintiff. Further it is confusing to the court due to uncertainty of the proper defendant.

Based on the above mentioned grounds, it is my finding that because its status in this action is invalid, Pan Ocean does not have the right to apply to set aside the writ and to seek other orders as in its notice of motion. I hereby dismissed with costs Pan Ocean's application in encl 29. For the D same reasons, I hereby allowed the plaintiff's application in encl 39 and grant the orders sought for as in prayers 1 and 2.

Even assuming Pan Ocean is entitled to enter appearance as of right as a defendant in this case by virtue of its contention that it is the beneficial owner of the ship 'Able Lieutenant', I am still of the view that the real issue E to be determined by the court is whether the admiralty in rem action was properly taken out by the plaintiff against the owners of the ship in accordance with the provisions of s 21(4) of the United Kingdom Supreme Court Act 1981 ('the UK Act').

Background on the 1952 Arrest Convention and the United Kingdom Supreme F *Court Act 1981 ('the UK Act')*

Before dealing with the above issue, it is important to bear in mind the underlying rationale of the 1952 Arrest Convention and the UK Act that gave effect to it.

G *The 1952 Arrest Convention*

Shipping is the most international of all the world's great industries and not surprisingly, a large number of international conventions govern the maritime industry. One of them is the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships 1952, in short, the Arrest Convention which sets out the law for the arrest of a sea H going ship. More then 70 states are parties to the Arrest Convention and many other states (including Malaysia) have given effect to the Convention even though they are not a party (see the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships 1952).

I *United Kingdom Supreme Court Act 1981 ('the UK Act')*

The United Kingdom is a party to the Arrest Convention. At first the United Kingdom enacted the Administration of Justice Act 1956 ('the

AJA') and the AJA only implemented the Arrest Convention partially. Commonwealth countries like Malaysia and Singapore followed the United Kingdom and gave effect to the AJA in their domestic legislation. Then in 1981, the United Kingdom enacted the UK Act to give full effect to the Arrest Convention, the relevant sections being ss 20–24 of the UK Act in respect of the admiralty jurisdiction of the court. Malaysia followed suit by the Courts of Judicature (Amendment) (No 2) Act 1984 (Act A606) and subsequently vide the Courts of Judicature (Amendment) Act 1987 (Act A670) but Singapore did not do so. In the premise, there are glaring differences in respect of the respective municipal laws relating to admiralty jurisdiction in Malaysia and Singapore.

Section 20(1) of the UK Act sets out the extent of the admiralty jurisdiction of the court. Section 20(2) identifies a 'closed' list of maritime claims within the court's admiralty jurisdiction and s 21 provides for the mode of exercise of this admiralty jurisdiction that gives the power of arrest. These are the two sections which are relevant in the present context of this case.

The application of the UK Act in Malaysia

As stated above, Malaysia enacted an amendment to the Courts of Judicature Act 1964 to give the force of law to the admiralty jurisdiction provisions of the UK Act as provided under s 24(b) of the Courts of Judicature Act 1964 which states as follows:

> Without prejudice to the generality of s 23 the civil jurisdiction of the High Court shall include —
>
> (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;

Interaction between the 1952 Arrest Convention and the Supreme Court Act 1981 ('the UK Act')

Before leaving the discussion on the background, it is worth noting that in England the courts are ready to use the 1952 Arrest Convention to interpret the UK Act. There is a long line of shipping cases where the English courts have considered the provisions of the 1952 Arrest Convention in order to construe the wording of the statutes as can be seen in the following cases:

(i) *The 'Eschersheim'* [1976] 2 Lloyd's Rep 1
(ii) *The 'Banco'* [1971] 1 Lloyd's Rep 49
(iii) *The 'Kommunar' (No 2)* [1997] 1 Lloyd's Rep 8
(iv) *The 'Evpo Agnic'* [1988] 2 Lloyd's Rep 411
(v) *The 'I Congresso Del Partido'* [1977] 1 Lloyd's Rep 536

In the book, *Dicey & Morris on the Conflict of Laws* (13th Ed, 2000) at p 456, the authors had this to say:

> The Supreme Court Act 1981 was enacted to implement the Brussels Convention of 1952 on the Arrest of Seagoing Ships. In interpreting the Act,

A recourse may be had not only to the Brussels Arrest Convention itself but also to its 'travaux preparatoires', the proceedings of the conference which led to it.

The purpose and effect of s 21(4) of the Supreme Court Act 1981 ('the UK Act')

On that background, I shall now proceed to consider s 21(4) of the UK Act B which reads as follows:

> In the case of any such claim as is mentioned in s 20(2)(e) to (r), where —
>
> (a) the claim arises in connection with a ship; and
>
> (b) the person who would be liable on the claim in action in personam ('the relevant person') was, when the cause of action arose, the owner or C charterer of, or in possession or in control of the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against —
>
> (i) that ship, if at the time when the action is brought, the relevant person is either the beneficial owner of that ship as respects all the shares in it or D the charterer of it under a charter by demise; or
>
> (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

What Pan Ocean has alleged is that at the time this action was brought, it was the beneficial owner of all the shares in the ship 'Able Lieutenant' and E not the defendant. Pan Ocean contends that since the defendant (Able Shipping) was not the beneficial owner of the said ship when this action was brought, the plaintiff has no right to arrest the ship 'Able Lieutenant' because this was in violation of the provision of s 21(4)(b)(i) of the UK Act. The defendant (Able Shipping) who has entered appearance as a defendant is also taking the same approach as Pan Ocean for its application in encl 31. F On this point of contention by both Pan Ocean and the defendant, with respect I could not agree with such a contention. I am of the view the issue to be determined in this case is not on the meaning to be given to the term or words 'beneficial ownership' in the context of the provision of s 21(4)(b)(i) of the said UK Act, but on the question as to when or under what circumstances the plaintiff has to prove beneficial ownership to enable G it to properly institute an admiralty in rem action against the owners of a ship as a defendant.

I am of the view that the law places the burden on the plaintiff to prove beneficial ownership of a registered ship only in those cases when the defendant is not the registered owner at the time when the action is brought H and the vessel arrested. In all other cases, the said UK Act enacted to give effect to the Arrest Convention, follows the ship register. Considering there is no public register for beneficial ownership of ships, if the view of the law by Pan Ocean and the defendant is to hold, then all maritime nations might as well close down their shipping registries. The provisions for registration in our Merchant Shipping Ordinance 1952 would then appear to have no I regulatory purpose. Also, the Arrest Convention which is only concerned with legal ownership, would have no effect. For these reasons, it is my view that the law cannot be as stated by Pan Ocean and the defendant.

The question that may be posed is why is the word 'beneficial' used in the UK Act? I take the view that in using the word 'beneficial' the legislature had only one objective: to catch the owner operating a registered ship under a nominee to avoid its arrest. This view is confirmed by his Lordship Robert Goff J in the case of *The 'I Congreso Del Partido'* [1977] 1 Lloyd's Rep 536 wherein at p 563, his Lordship had this to say:

> As I read s 3(4), the intention of Parliament in adding the word 'beneficially' before the word 'owned' in s 3(4) was simply to take account of the institution of trust, thus ensuring that, if a ship was to be operated under a cloak of trust, those interested in the ship would not thereby be able to avoid the arrest of the ship. (Note: Section 3(4) here is the provision under the repealed Administration of Justice Act 1956).

In view of the above mentioned proposition, English courts (and Malaysian courts) would apply the beneficial ownership provision in the UK Act in such a manner to achieve the particular objective as stated by his Lordship Robert Goff J. Therefore, s 21(4)(b)(i) must be interpreted and applied in the context of the purpose of s 21(4) of the UK Act. When properly construed under the purpose of s 21(4) of the UK Act, it will be seen that the courts give effect to the word 'beneficial' only in specific cases.

What is the purpose of s 21(4) of the Supreme Court Act 1981 ('the UK Act')

In the case of *The 'Evpo Agnic'*, the English Court of Appeal at p 415 had this to say, inter alia, on the purpose of s 21(4) of the UK Act:

> The purpose of s 21(4) is to give rights of arrest in respect of 'the particular ship', ships in the ownership of the owners of 'the particular ship' and those who have been spirited into different legal, ie registered, ownership, the owners of 'the particular ship' retaining beneficial ownership of the shares in that ship. This was the situation in *The 'Saudi Prince'* [1982] 2 Lloyd's Rep 255 and was alleged to be the situation in *The 'Aventicum'* [1978] 1 Lloyd's Rep 184.

Based on the abovementioned case of *The 'Evpo Agnic'* it can be said that there are three rights of ship arrest provided for by s 21(4) of the UK Act. Firstly, it is the arrest of the particular ship (category 1), secondly, arrest 'of the sister ship' (category 2) and thirdly, arrest of a particular ship spirited away into a different legal ownership (category 3). In the case of categories 1 and 2, it is my view that the burden of proof is on the plaintiff to show that the defendant is the registered owner of the vessel when the writ is issued. This follows the Arrest Convention where only legal ownership matters. Article 3.1 and 3.2 of the Arrest Convention reproduced below states as follows:

> Article 3.1
>
> Subject to the provisions of s 4 of this Article and of art 10, a claimant may arrest either *the particular ship* in respect of which the maritime claim arose, *or any other ship* which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in art 1(1)(o),(p) or (q).

A Article 3.2

Ships shall be *deemed* to be in the *same ownership* when all the shares therein are *owned* by the same person or person. (Emphasis added.)

The issue of beneficial ownership does not arise in categories 1 and 2 because the registered owner of a ship registered in a recognized port B registry under the laws of a maritime nation is also its beneficial owner. The English Court of Appeal case of *The 'Evpo Agnic'* and the case of *The 'Tian Sheng (No 8)'* can be cited as authorities for such a proposition. The case of *The 'Tian Sheng (No 8)'* is a decision of the highest appellate court in Hong Kong, equal to our Federal Court. Even in the Singapore High Court case of *The 'Kapitan Temkin'* [1998] 3 SLR 254, the Court therein at p 257 said:

C

> ... the certificate of registration is important documentary evidence in deciding who the beneficial owners of a ship for purposes of jurisdiction are ...

Learned counsel for Pan Ocean and the defendant in their reply have not countered the abovementioned case authorities.

D The third right of arrest (category 3) under s 21(4) of the UK Act as stated in *The 'Evpo Agnic'* is the right to arrest ships spirited away into different registered ownership. It is in this situation that the plaintiff has the burden of proof to establish beneficial ownership. This is obvious as it is pointless relying on the register because the register would show the new owners who are strangers to the plaintiff and who would not be liable on the E claim. So, in this situation, if a plaintiff brings an action against the ship, he must be in a position to prove that the ship, though registered in a stranger's name, is beneficially owned by the person who would be liable to him. This is illustrated by the two cases referred to by Lord Donaldson MR in his judgment in *The 'Evpo Agnic'* namely, the case of *The 'Saudi Prince'* and the case of *The 'Aventicum'*. In the case of *The 'Saudi Prince'*, the plaintiffs F arrested the vessel *The 'Saudi Prince'* for a cargo claim. When the cause of action arose, the ship was owned by one Mr Orri. But before the writ was issued, the ship was transferred to another company SSST, where Orri and his children owned all the shares. The new registered owners, SSST, argued they were the new legal and beneficial owners and not liable on plaintiff's claim. The plaintiff therefore had to prove that, despite the change in the G register, Mr Orri retained the full beneficial interest in the ship and therefore the ship could be arrested for the claim. The court found that on the evidence, SSST was a nominee of Mr Orri and that beneficial ownership of the ship remained with him. In the case of *The 'Aventicum'* where a similar situation arises the plaintiffs arrested the vessel for a cargo claim. H Between the time when the cause of action arose and when the writ was issued, the ship 'Aventicum' had undergone two changes of legal ownership. Both sets of new owners were strangers to the plaintiffs and not liable on the claim. The plaintiffs argued that while it was true that there had been changes in the legal ownership, the defendants, they said, remained the beneficial owner despite the two changes in the register. The plaintiffs I could not succeed because they could not prove this.

Both the cases of *The 'Saudi Prince'* and *The 'Aventicum'* show the defendants, the persons who would be liable to the plaintiffs, were not the

registered owners of the ships when arrested. In each case, the plaintiffs argued, despite the change of the registered owner, beneficial ownership was retained by the previous owners liable to the plaintiffs. Both cases illustrate the principle that the plaintiffs bear the burden of proving beneficial ownership only when they want to proceed against a ship not in the registered ownership of the defendant who would be liable to them on the claim. This is the only situation where the court would ignore the owner's name listed on the ship's register and look behind the register to catch the real shipowner hiding behind the nominee. In all other cases, the registered ownership of the ship as in the ship's register is paramount.

The case of The 'Tjaskemolen'

The case of *The 'Tjaskemolen'* [1997] 2 Lloyd's Rep 465 is a direct authority on the application of the beneficial ownership provision in s 21(4)(b)(i) of the UK Act. Learned counsel for Pan Ocean has also submitted this case in support of its contention. An analysis of this case in my view, with respect to Pan Ocean's contention, does not so support its contention at all. In *The 'Tjaskemolen'*, the plaintiffs' claim was for damages for breach of charterparty concluded between plaintiffs as charterers and one Bayland, the owners of the 'Tjaskemolen'. When the writ was issued, the ship had already been sold to one Golden Navigation. Golden Navigation purchased the ship, registered it in the Port of Belize and renamed it 'Visliet'. It was in these circumstances the court said the plaintiffs must prove that Bayland were the beneficial owners of the ship when the action was brought because it was in a different registered ownership. On this point, his Lordship Clarke J explains in *The 'Tjaskemolen'* at p 468, inter alia, as follows:

> Bayland were both the persons who would be liable on the claim in action in personam and the owners (that is the legal owners) of the vessel when the cause of action arose. That is common ground. It is equally common ground that, in order to satisfy the provisions of s 21(4)(b)(i) of the Supreme Court Act 1981, the plaintiffs must prove that when the writ was issued, Bayland were the beneficial owners of the vessel.

The plaintiffs had to prove that Bayland were the beneficial owners and to do this they had to show the legal transfer to Golden Navigation was a sham or a facade. On this point, his Lordship Clarke J in the case of *The 'Tjaskemolen'* at p 471 had this to say:

> But in the present context, the cases seem to show that where the alleged transfer is a sham or a facade, it will not have the effect of transferring the beneficial ownership of the transferor in the vessel concerned ... . It may be that if the legal title is transferred, the transferee would hold the vessel as trustee for the transferor so that the beneficial interest in the same sense described in *The Congreso del Partido* [1977] 1 Lloyd's Rep 536 is retained by the transferor.

It is clear from the above passage that the court investigates beneficial ownership only where the defendants are not the registered owners in line with his Lordship Justice Goff's comments in the case of *The 'I Congreso del Partido'* and as adopted in *The 'Evpo Agnic'*. The court in the case of *The*

A *'Tjaskemolen'* on the facts found the transfer was a sham. His Lordship Justice Clarke's conclusion on the application of the term 'beneficial' is in full agreement with the ratio as expressed in the case of *The 'Evpo Agnic'* wherein at p 474 of the said case his Lordship, inter alia, states as follows:

> In short, this is an example of a case in which, in the words of Sir John
B Donaldson MR in *The Evpo Agnic*, the vessel has been *spirited* into *different ownership*. (Emphasis added.)

It is my finding that *The 'Tjaskemolen'* fully supports the plaintiff's proposition of the law and not that as contended by Pan Ocean and the defendant. Pan Ocean and the defendant relied also on the following
C English and Malaysian cases to show that the court places the burden of proof on the plaintiff to investigate beneficial ownership in each and every case:

(i) *The 'Aventicum'*

(ii) *The 'Loon Chong'* [1982] 1 MLJ 212

D

(iii) *The 'Hope (ex-Panagia)'* (1998) 1 LNS 177

(iv) *The 'Tian Sheng (No 8)'*

On this point of contention by Pan Ocean and the defendant, I only need to say that in the case of *The 'Aventicum'* referred to earlier, the plaintiffs
E were obligated to prove beneficial ownership because the ship was not in the registered ownership of the person who would be liable on the claim when the writ was issued. In the case of *The 'Loon Chong'* [1982] 1 MLJ 212 a decision of our Federal Court, the plaintiffs (respondents) arrested the ship 'Loon Chong' for a claim against one Lord Steamship CSA (Panama). But when the writ was issued, the legal ownership had been transferred to one
F Melbourne Plaza Navigation SA (Panama). So the only way the plaintiff could invoke the admiralty jurisdiction was by proving that Lord Steamship was the beneficial owner even though the registered owner was Melbourne Plaza. Though decided on the law before the coming into force of the 1981 UK Act, it is a classic case of a ship falling into the third category of arrest
G spiriting the ship into a different registered ownership. The Federal Court in the case of *The 'Loon Chong'* followed *The 'Aventicum'*. The case referred to in *The 'Evpo Agnic'* wherein the Federal Court had this to say at p 213:

> It would however be open to the respondents to contend to the contrary on the premise that the documents and transactions entered into were fictitious and the ownership was in fact in Lord at the time of the issue of the writ and
H the arrest, but the burden of proof in this regard would be on the respondents (*The 'Aventicum'* [1978] 1 Lloyd's Rep 184).

The defendant (Able Shipping) also relied on the case of *The 'Hope (ex-Panagia)'*, another Malaysian case decided in 1997 under the UK Act. In that case, there was a change of registered ownership and once again the
I burden was placed on the plaintiffs to prove beneficial ownership only because the defendant was not the registered owner of the ship when the action was brought.

Is the ship register conclusive as to the ownership of a registered vessel? A

Pan Ocean and the defendant have argued the ship register is not conclusive. I would take the view that the ship register is conclusive except for error or fraud. Two authorities clearly established this point. In *The 'Tian Sheng (No 8)'*, the Hong Kong Court of Final Appeal had stated as follows: B

> Conceivably, there are circumstances where it might be shown that the registered owner was in fact not the legal and beneficial owner of all the shares in the ship. The fraudulent procurement of registration would be an example. But, in the general run of things, registration would be virtually conclusive and it would take an exceptional case for it to be otherwise.

In the case of *The 'Kapitan Temkin'* at p 257, the court therein, inter alia, C also makes the position clear as follows:

> The certificate of registration, adds *Chorley & Giles Shipping Law* at p 36, 'fulfils to a certain extent the junction of title deed'. In this sense the certificate of registration is similar to a certificate of title issued under the Torrens system of land registration which was replicated from the paradigm of the ship registration system. The title evidenced by the certificate of registration is D similarly indefeasible, subject of course to rectification in cases like error or fraud. See *The 'Bineta'* [1966] 2 Lloyd's Rep 419.

The onus of proof is therefore on Pan Ocean and the defendant to show that Able Shipping's name on the register appears by error or fraud. Since they have not done this, it must be taken that the register is conclusive. Under E English law, in the case of a registered ship, once the plaintiff establishes that the defendant is the registered owner of the ship when the writ is issued, the burden of proof shifts to the person contending otherwise. A reference to the book *Chorley and Giles Shipping Law* (8th Ed) supports the above proposition wherein at p 35 it had this to say:

> ... registration is also important as proof of title. It is not conclusive but furnishes at least prima facie evidence of the registered owner being the true owner, thus resulting in a shifting of the burden of proof. Whoever, without being registered, claims ownership must displace that prima facie evidence. F

This prima facie evidence rule does not apply in Singapore, so their decisions have to be read with caution. This was confirmed in the case of *The 'Opal 3'* G [1992] 2 SLR 585 where the court therein after referring to the above quoted passage, *Chorley and Giles Shipping Law* at p 589, said as follows:

> The principle of prima facie evidence stated in *Chorley and Giles* is supported by *The 'Rose'* and *The 'Bineta'* but they must be read with reference to British law. H

The burden of proof therefore has shifted to Pan Ocean and the defendant to dispel the plaintiff's case established by the plaintiff.

Distinguishing the Singapore decisions in The 'Andres Bonifacio' and The 'Temasek Eagle'. I

Singapore decisions in the case of *The 'Andres Bonifacio'* followed in the case of *The 'Temasek Eagle'* are two cases which were decided differently and are

A said to be in support of Pan Ocean and the defendant's contention. It is my view that the decisions of the said two cases are peculiar to Singapore and can be distinguished for the following reasons:

(1) Singapore does not follow the case of *The 'Evpo Agnic'* though it recognizes the dictum there as the ratio decidendi of the case. In
B particular, Singapore courts do not accept the word 'owner' in s 21(4)(b) to mean 'registered owner' as decided by *The 'Evpo Agnic'* which is consistently approved and applied in a number of English Court of Appeal decisions and recently approved in the case of *The 'Tian Sheng (No 8)'*. In the case of *The 'Ohm Mariana'* [1993] 2 SLR 698, the Singapore Court of Appeal on the meaning of the word
C 'owner' at p 709 had this to say:

> In our opinion *The 'Evpo Agnic'* is not an authority for the proposition that the word 'owner' in s 21(4)(b) (which is equivalent of s 4(4) of our Act) means the 'registered owner'.

D (2) Singapore will not look at the Arrest Convention to interpret their law on arrest. His Lordship Wee Chong Jin CJ in the case of *The 'Permina 108'* [1977] 1 MLJ 49 at p 50 said as follows:

> In our opinion the terms of s 4(4) of the Act, giving them their plain and ordinary meaning are free of any ambiguity and are not reasonably capable of more than one meaning. It follows that it is unnecessary and
E indeed it would be wrong to look at the International Convention Relating to the Arrest of Seagoing Ships signed at Brussels in 1952 to arrive at the proper construction of our subsection.

(3) Singapore does not apply the full provisions of the the UK Act as Hong Kong and Malaysia do but follows the earlier UK Administration of Justice Act 1956 repealed in the UK and Malaysia.
F

(4) The cases of *The 'Andres Bonifacio'* and *The 'Temasek Eagle'* have not been followed in any of the English cases on beneficial ownership. Learned counsel for Pan Ocean submitted that the case of *The 'Andres Bonifacio'* decided in 1993 'settled the law', yet no jurisdiction outside Singapore has applied it in the context of s 21(4)(b)(i) of the UK Act.
G The net result is neither counsel for Pan Ocean nor counsel for the defendant have cited a single authority decided under the specific provision of s 21(4)(b)(i) of the UK Act in any jurisdiction which decides that the plaintiff has to prove beneficial ownership when the defendant is the registered owner of the arrested vessel. All the English and Malaysian cases are completely against them, including the case
H of *The 'Tjaskemolen'* which appears to be the only direct case on the application of s 21(4)(b)(i) of the UK Act decided on the principle laid down in *The 'Evpo Agnic'*.

It is my view that under s 24(b) of our Courts of Judicature Act 1964 this court has to apply the UK Act in the same manner as an English High Court
I would, and therefore, decided English cases should be followed over Singapore decisions which are in conflict and which do not apply the UK Act. In the circumstance of this case, it is my finding that the plaintiffs have

discharged the onus of proof on them and have properly brought this action under the admiralty jurisdiction of this court pursuant to the UK Act. A

Further, on the plaintiff's alternative argument against Pan Ocean's application in encl 29 and the defendant's application in encl 31, I am of the view that if it is necessary for the plaintiff to prove at the time the admiralty in rem action was taken, the beneficial owner of the ship 'Able Lieutenant' was not the defendant but Pan Ocean, then the plaintiff is not precluded from proving that the transfer of beneficial ownership of the ship from the defendant to Pan Ocean is a sham transaction. Learned counsels for both Pan Ocean and the defendant have argued that 'sham' means fraud and therefore contended that the plaintiff must prove sham beyond reasonable doubt. On this point, I find that the plaintiffs have contended sham throughout. Nowhere in plaintiff's affidavits or submission of counsel has the plaintiff alleged fraud. I take the view that Pan Ocean's and the defendant's attempt to equate sham with fraud is a baseless attempt to raise the standard of proof. A sham transaction in the context of the present case means not a genuine sale and not an arm's length transaction but a commercial arrangement. It may even be called a sale of convenience. All cases involving sham transactions such as *The 'Tjaskemolen'*, *The 'Saudi Prince'*, *The 'Aventicum'* and the Malaysian case of *The 'Loon Chong'*, sham was proven on a balance of probabilities. In another Malaysian case, *The 'Sino Glory'* [1997] 4 AMR 3694, sham was also proved on a balance of probabilities. B C D E

In raising the issue of sham transactions, the plaintiff has questioned whether any person with a commercial interest would purchase a vessel valued at USD3m with an outstanding mortgage of USD10m. I am of the view that a person would do so only if it is a sham arrangement or a sale of convenience. I also find that for the defendant (Able Shipping) to sell their asset for USD3m and retain a mortgage debt of USD9.5m on the same asset (which given the dire financial situation they can never settle) smacks of a sham. Learned counsel for the defendant argues that the presence of mortgages does not prevent a sale of the vessel. It was contended for the defendant that the fact that an asset is encumbered by an unpaid mortgage is also of no hindrance to a potential buyer as then the potential buyer would ensure that the mortgage be discharged from the purchase price. I am in full agreement with such a statement but Pan Ocean appears to have only made arrangements to discharge one mortgage debt of USD500,000. The other mortgage debt of USD9.5m also remains undischarged till to date and this has to be discharged by the defendant who is in a state of insolvency. Therefore it is highly unlikely that a normal transfer of an asset could have taken place in such a situation unless the alleged sale is a sham arrangement. F G H

Pan Ocean also argues that they bought the vessel subject to the bank's interests. But there is no independent confirmation from the mortgagee banks. The only evidence are affidavits filed in another court case showing the mortgagees are aware of the sale. These affidavits cannot be given due weight as evidence in this action. Even so, the mortgagee banks state unequivocally that they want to sell the vessel to recover their mortgage debt. Pan Ocean has informed the banks it is prepared to buy the vessel and I

A discharge the mortgage debt and the banks are naturally gratified if a buyer is willing to discharge the USD10m mortgage in addition to paying the value of the ship at USD3m. To my mind, it is like a dream come true for the mortgagee banks caught out lending more than three times the value of the asset. This dream remains unrealized. It must be noted that if the sale was subject to the mortgagees' interests, then there would be a transfer of
B the mortgage. In the mortgage form, registered at the Port Klang ship registry there is no transfer of mortgage. Letters from the bank's solicitors also show ownership of the ship remains in the defendant. If the alleged sale to Pan Ocean was done with the express consent of the mortgagee, their solicitors would have stated so in their letter.

C Pan Ocean and the defendant also contended that the sale of the said ship 'Able Lieutenant' took place before the plaintiff filed its claim. It was argued that the plaintiff's claim did not exist when the bill of sale was executed, so it cannot be a sham. I am of the view that the date of the bill of sale does not matter because it can be secretly executed for future claims. On this point, I would like to refer to *The 'Tjaskemolen'* wherein at p 471,
D his Lordship Clarke J had this to say:

> That case is an example of piercing the corporate veil where assets are deliberately transferred from A to B in the knowledge that to do so will defeat a creditor's claim or potential claim even if that is not proved to be the purpose of doing so.

E It is also noted that it was a condition in the memorandum of agreement in cl 30 between Pan Ocean and the defendant (Able Shipping) that the sale of 'Able Lieutenant' must be kept secret and confidential even if the sale was not completed (see exh 'SS1' in encl (30)). Learned counsel for the defendant also argues that the bill of sale has divested the title from the defendants and vested it in Pan Ocean. However, a reference to a letter from
F mortgagee bank solicitors dated 3 January 2002 (see exh 9d in encl 48) showed otherwise wherein, inter alia, it states as follows:

> ... we are to state here that payment from Able Shipping Sdn Bhd is still due and owing to our client till this point in time. The above is the only vessel secured to our client.

G I would hasten to add that if title had been divested, the bank would be pursuing Pan Ocean instead of the defendants. It must be noted that under the Merchant Shipping Ordinance 1952 ('MSO'), a bill of sale must be recorded in the ship registry to pass title. The title to the ship therefore cannot pass to the purchaser unless the bill of sale is recorded in the registry in the buyer's name (see *The 'Wilbie'* [1983] 1 MLJ 204). The bill of sale in
H this case (see exh 'SS2' in encl (30)) also contains a similar note which states, inter alia, as follows:

> A purchaser of a registered Malaysian vessel does not obtain a complete title until the bill of sale is recorded at the Port of Registry of the ship, neglect of this precaution may entail serious consequences.

I Learned counsel for Pan Ocean and the defendant contended that property in the ship passed without the need for any registration under the MSO. I could not agree with such a contention and only need to cite the case of

'*Naamlooze Vennootschap*' (1925) 20 Lloyd's LR 296 wherein at p 300, the English Court of Appeal had this to say: A

> Now the law relating to the transfer of ships is one of peculiar nature. All the incidents that relate to the sale of chattels clearly do not relate to the sale of ships because the transactions are governed to a large extent by the provisions of different Merchant Shipping Acts. It was said by Turner LJ in the case of *Hooper v Gurnm* 2 Ch App 282 in which he had to deal with an American ship, at p 290, that: B
>
> > 'A ship is not like an ordinary personal chattel; it does not pass by delivery; nor does the possession of it prove the title to it. There is no market overt for ships.
> >
> > Whether the proposition may not be subject to certain limitations and restrictions it is quite unnecessary to decide now, but it is quite plain that a great deal of the law as to the passing of property in ships depends upon the provisions of the Merchant Shipping Acts.' C

Therefore in the circumstances of this present case, it is my finding whether the property in the said ship 'Able Lieutenant' passed or not is a triable issue. D

Learned counsel for Pan Ocean claims that they have sent the ship documents for transfer at the ship registry in Port Klang and it has been lying there for the last seven months. On this state of position Pan Ocean is in, I am of the view that the conclusion that can be drawn is that Pan Ocean is definitely not entitled to be registered as an owner of the ship 'Able Lieutenant'. Learned counsel for Pan Ocean also argued that the plaintiff's charterparty with the defendant expired on 6 October 2001. Therefore it was submitted that the plaintiff has no right to the claim. I could not agree with such a contention. The charterparty was done on 2 October 2000 and has an automatic renewal clause every three months. The date 6 October 2001 is not the expiry date but the renewal for the next three months — the fourth renewal under the charterparty (see exh 'NKPI' in encl (3)). The charterparty was executed between plaintiff and defendant and the defendant fully accepted and agreed that the charterparty was extended on 6 October 2001 for a further three months. E F G

Pan Ocean further alleged that the plaintiff had notice of Pan Ocean's beneficial ownership of 'Able Lieutenant' before its arrest. It is noted that the plaintiff admitted receiving the said fax from the defendant on 5 November 2001 stating simply:

> We have sold the vessel 'Able Lieutenant' to Pan Ocean Sdn Bhd. Kindly deliver the said vessel to the new owner immediately. H

This was the very first notification, though the ship was allegedly sold on 19 February 2001, ten months earlier and kept a secret. I am of the view that the said fax from the defendant did not notify the 'beneficial' ownership at all. Nor were details of the bill of sale or memorandum of agreement furnished. Until this action, plaintiff had no knowledge of the bill of sale. Neither can Pan Ocean prove that the plaintiff had such knowledge. The said fax also appears suspicious as no telephone numbers, no fax number I

A and no address of the sender are given which appears unusual for a commercial company. To find out the truth, the plaintiff checked with the ship registry at Port Klang twice on 24 November 2001 and 28 November 2001 which confirmed that the defendant was the registered owner. There was never any intimation of beneficial ownership. Pan Ocean argued that the plaintiff had prior knowledge of beneficial ownership as early as B 6 October 2001 and relied on exchange of email messages. Not one of the messages exhibited shows the fact of such notice to the plaintiff. In fact, the email message of 5 November 2001 from the plaintiff to one Capt Pani from Pan Ocean discloses that the plaintiff was not even sure Pan Ocean was the registered owner of 'Able Pilot', another ship registered in the name of Pan C Ocean six months earlier but was not revealed to the plaintiff by Pan Ocean. There is also a circular showing that 'Able Lieutenant' is owned by a controlling company named Malaysian Merchant Marine Bhd ('MMM'). On 24 October 2001, nine months after the alleged purchase of the ship by Pan Ocean, notices were sent out to the shipping community by MMM stating they were the owners of the ship. Pan Ocean's allegation that D the plaintiff was aware of their beneficial ownership is therefore devoid of merit.

Apart from the above mentioned disputed issues, it is also my finding that the plaintiff has raised several other triable issues by pointing out serious conflict of material evidence and inconsistencies in the following E subject matters:

(1) validity of the bill of sale;

(2) validity of the memorandum of agreement;

(3) validity of the supplemental agreement;

F (4) whether Pan Ocean had actually paid the purchase price of the ship;

(5) whether Pan Ocean insured the ship, employed the crew and paid all the expenses;

(6) the close connections between the defendant and Pan Ocean;

(7) how Pan Ocean/MMM controlled the defendant's activities through a G company named Mymerine.

It is my finding that these issues can only be resolved at trial or by subjecting the deponents of the various affidavits to cross-examination.

The defendant and Pan Ocean have argued that the issue of admiralty jurisdiction must be decided at this stage. Learned counsel for Pan Ocean H urged that prayers 1 and 2 of its notice of motion in encl 29 are for deciding jurisdiction. She said it is to the court's preference which prayer is to be used to set aside or strike out. I find this submission plainly wrong. While prayer 1 of the application in encl 29 is a challenge to jurisdiction under O 12 r 7 of the RHC, prayer 2 invokes the court's jurisdiction to strike out the writ under the court's summary powers in O 18 r 19 of the RHC. The same goes I for prayers 2, 3 and 4 of the defendant's application in encl 31 which invokes the court's jurisdiction under O 18 r 19 of the RHC. It appears that the defendant and Pan Ocean are blowing hot and cold, wherein on one

hand challenging the jurisdiction of the court and on the other hand seeking the court's jurisdiction to investigate the merits of the plaintiff's claim as disclosed on the writ. The defendant and Pan Ocean in their respective applications have failed to make an election as to whether to challenge the jurisdiction or invoke the court's jurisdiction to hear the case on its merits. See the case of *PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd* [1999] 6 MLJ 1. If a party wishes for the court to set aside a writ or strike out the writ, it is incumbent upon that party to place before the court in clear unambiguous terms the expectation and not leave it to the court to make its preference, as suggested by Pan Ocean. The considerations for setting aside under O 12 r 7 of the RHC and striking out under O 18 r 19 of the RHC are different. When it is not a plain and obvious case, where there is a serious conflict of material evidence and when there are several complicating triable issues of fact and law, the court should set down the matter for trial.

In the case of *The 'Hope (ex-Panagia)'* the defendant applied to set aside or strike out the writ at the same time. In the face of conflicting affidavit evidence, his Lordship Ghazali J (as he then was) set down the issue of beneficial ownership for trial. In the case of *The 'Andres Bonifacio'* the Court of Appeal blamed the plaintiffs for their failure in not requesting further discovery or an application to examine the deponent when there is conflict of material evidence. Here in the present case, the plaintiff filed an application to cross-examine the deponent to the various affidavits in encl 39 and the opportunity must be given to verify the truth of the facts.

In the circumstances of this case, even if the court is to decide the case on the basis of the plaintiff's alternative argument that the alleged transfer of beneficial ownership from the defendant to Pan Ocean is a sham transaction, I would have also dismissed both Pan Ocean's application in encl 29 and the defendant's application in encl 31 with costs and set down the matter for trial.

Finally, I shall deal with Pan Ocean's application in prayer 2 of encl 21 to furnish an amended bail bond for the release of the ship 'Able Lieutenant' as contained in Appendix 1 of the application. It must be stated here that after the hearing was well under way, Pan Ocean completely abandoned the amended bail bond of Appendix 1 of encl 21. Instead, they have now put forward a fresh amended bail bond by way of an affidavit as in encl 50. On this fresh amended bail bond, I find that Pan Ocean has not sought an amendment to prayer 2 of encl 21 to include this. It is my finding that the court is not empowered to determine the fresh amended bail bond in encl 50 because it is not part of encl 21.

Learned counsel for Pan Ocean argues that this fresh amended bail bond can be considered under prayer 4 of encl 21, 'such further or other order'. It is my view that this prayer is an ancillary prayer and subject to the main prayer and cannot be used to launch an application different from what is prayed for in the application itself. On this ground alone, I would dismiss prayer 2 of the application in encl 21 with costs since Pan Ocean has abandoned it.

A Even assuming that it is proper and in order for Pan Ocean to have put forward a fresh amended bail bond by way of an affidavit in encl 50, I would still dismiss the application for the following reasons:

1 A reference to para 1 of the bail bond showed that the bond does not secure the claim in the action. In the usual case, there is only one B defendant and the reference to the defendant in the bail bond causes no confusion on identity. However, there is a peculiar situation of two defendants in the present case wherein it is unclear and uncertain which defendant is being referred to. Therefore, the defendant, Able Shipping Sdn Bhd, must be named to avoid confusion with defendant Pan Ocean. This is consistent with para 2 of the bail bond which refers C to the claim in this action, because only the defendant, Able Shipping, would be liable for the claim in this action.

2 A reference to para 3 of the bail bond showed that it is prejudicial to the plaintiff because of the following:

D (i) the paragraph recognizes and acknowledges Pan Ocean as the beneficial owner of the vessel, which is the subject of challenge;

(ii) the paragraph recognizes and acknowledges that Pan Ocean has the locus standi and right to apply to set aside/strike out the writ which is being challenged by the plaintiff. In the case of *The 'Bulgaria'* [1964] 2 Lloyd's Rep 524 the application to amend E the bail bond was made by the registered owners of the vessel defending the claim and their capacity to enter appearance was not the subject of challenge;

(iii) the paragraph states 'court's finding that the defendant is Pan Ocean'. There is no such prayer for determination of this court. F On admiralty jurisdiction, the issue is whether the defendant is the beneficial owner of the ship 'Able Lieutenant'.

In the case of *'APJ Shalin'* [1991] 2 Lloyd's Rep 62 his Lordship Sheen J, on the issue of order for the release of a ship, at p 67 had this to say:

> G I cannot foresee any circumstances in which it would be right for the court to order the release of a ship without security being given against the wishes of a creditor who has properly exercised his right to arrest the ship.

Based on the above mentioned case authority, I would state that this court would release the vessel only when there is sufficient and proper alternative security given for the plaintiff's claim in the action. In the circumstances of H this case, it is my finding that the proposed bail bond furnished by Pan Ocean under its so called fresh amended bail bond as in encl 50 is ineffective and invalid as it did not comply with the format of a bail bond provided under O 70 r 15 of the RHC. Pan Ocean's application in encl 21 is therefore dismissed with costs.

I *Enclosures 21, 29, 31 dismissed and encl 39 allowed.*